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CHAPTER 4

Treaty Affairs

A. CONCLUSION, ENTRY INTO FORCE, AND RESERVATIONS

1. U.S. Objections to Palestinian Authority Efforts to Accede to Treaties

On April 2, 2014, the Palestinian Authority tendered instruments of accession by the "State of Palestine" to twenty multilateral treaties. For those treaties to which the United States is a party, the United States communicated objections to the purported accessions on the basis that the United States does not recognize the "State of Palestine" as an independent state and therefore considers the Palestinian Authority ineligible to become a party to multilateral treaties for which accession is limited to sovereign States. The U.S. objections further indicate that the United States does not consider itself to be in a treaty relationship with the "State of Palestine" under those treaties.

The U.S. objection sent to the United Nations with respect to the Vienna Convention on Diplomatic Relations, done at Vienna, 18 April 1961, is excerpted below. Nearly identical objections were sent regarding the following: Convention Respecting the Laws and Customs of War on Land, with Annexed Regulations, done at The Hague, 18 October 1907; Geneva Convention for the Amelioration of the Condition of Wounded and Sick in Armed Forces in the Field of 12 August 1949; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949; Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949; Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949; UN Convention on the Prevention and Punishment of the Crime of Genocide, done at Paris, 9 December 1948; Vienna Convention on Consular Relations of 24 April 1963; International Convention on the Elimination of All Forms of Racial Discrimination, done at New York, 7 March 1966; International Covenant on Civil and Political Rights, done at New York, 16 December

1966; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, done at New York, 10 December 1984; Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, done at New York, 25 May 2000; UN Convention Against Corruption, done at New York, 31 October 2003. Copies of the objection notes are available at *www.state.gov/s/l/c8183.htm*. The UN related the Palestinian Authority reaction to the U.S. objections in notifications available on the UN website. See, *e.g.*, communication relating to the VCDR, available at *https://treaties.un.org/doc/Publication/CN/2014/CN.342.2014-Eng.pdf*.

* * * *

The United States Mission to the United Nations presents its compliments to the United Nations and has the honor to refer to the Secretary-General's depositary notification C.N.176.2014, dated April 9, 2014, regarding the purported accession of the "State of Palestine" to the Vienna Convention on Diplomatic Relations, done at Vienna April 18, 1961.

The Government of the United States of America does not believe the "State of Palestine" qualifies as a sovereign State and does not recognize it as such. Accession to the Convention is limited to sovereign States. Therefore, the Government of the United States of America believes that the "State of Palestine" is not qualified to accede to the Convention and affirms that it will not consider itself to be in a treaty relationship with the "State of Palestine" under the Convention.

* * * *

2. Purported "Treaty" between Georgia's Abkhazia Region and the Russian Federation

On November 24, 2014, the State Department issued a press statement on the signing of a "treaty" between the Abkhazia region of Georgia and the Russian Federation. See press statement, available at *www.state.gov/r/pa/prs/ps/2014/11/234367.htm*. The press statement refers to the longstanding position of the United States that Abkhazia and South Ossetia are integral parts of Georgia. Accordingly, the press statement says, "the United States will not recognize the legitimacy of any so-called "treaty" between Georgia's Abkhazia region and the Russian Federation."

3. Objection to Reservation by Kuwait

On July 21, 2014, the U.S. Mission to the UN sent a diplomatic note to the United Nations, in its capacity as depositary for the International Convention for the Suppression of the Financing of Terrorism, conveying its objection to a reservation made by the Government of Kuwait to the Convention. The body of the diplomatic note is set forth below.

* * * *

The United States Mission to the United nations presents its compliments to the United Nations in its capacity as depositary for the International Convention for the Suppression of the Financing of Terrorism, with Annex ("Convention"), and refers to the reservation made by the Government of Kuwait upon ratification of the International Convention for the Suppression of the Financing of Terrorism, with Annex (1999) (the Convention), on July 11, 2013.

The Government of the United States of America, after careful review, considers the declaration made by Kuwait to be a reservation that seeks to limit the scope of the Convention on a unilateral basis. The reservation is contrary to the object and purpose of the Convention, namely, the suppression of the financing of terrorist acts, irrespective of where they take place and who carries them out.

The Government of the United States also considers the reservation to be contrary to the terms of Article 6 of the Convention, which provides: "Each State Party shall adopt such measures as may be necessary, including, where appropriate, domestic legislation, to ensure that criminal acts within the scope of this Convention are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature."

The Government of the United States notes that, under established principles of international treaty law, as reflected in Article 19(c) of the Vienna Convention on the Law of Treaties, a reservation that is incompatible with the object and purpose of the treaty shall not be permitted.

The Government of the United States therefore objects to the reservation made by the Government of Kuwait upon ratification of the Convention. This objection does not, however, preclude the entry into force of the Convention between the United States and Kuwait.

The United States Mission avails itself of this opportunity to renew to the United Nations the assurances of its highest consideration.

* * * *

4. ILC Draft Articles on the Effects of Armed Conflict on Treaties

On October 23, 3014, the United States provided a statement on the work of the International Law Commission ("ILC") and the special rapporteur on the draft articles and commentaries on the effects of armed conflict on treaties. John Arbogast, Counselor for Legal Affairs for the U.S. Mission to the UN, delivered the statement, which reiterated U.S. support for the principle of continuity of treaty obligations during armed conflict when reasonable, taking into account military necessities. The U.S. statement noted that the draft articles "provide practical guidance to States by identifying factors relevant to determining whether a treaty should remain in effect in the event of an armed conflict." U.S. statement, available at *https://papersmart.unmeetings.org/media2/4654072/us-en-84.pdf*. The U.S. statement

expressed concerns, however, about the definition of "armed conflict" in draft article 2(b). The United States favored making clear that armed conflict referred to the conflicts covered by common articles 2 and 3 of the 1949 Geneva Conventions. Finally, the U.S. statement conveyed the U.S. view that the draft articles should be used as a resource and not transformed into a convention.

5. ILC's Work on Provisional Application of Treaties

The United States submitted its response to the ILC's request for information regarding U.S. practice relating to the provisional application of treaties in 2014. The U.S. response, excerpted below, and available at *www.state.gov/s/l/c8183.htm*, provides examples of practice and statements by the United States related to the questions posed by the ILC on the topic of provisional application.

* * * *

I. GENERAL EXAMPLES OF U.S. PRACTICE

Provisional application is discussed extensively in the following two documents, in which the President transmitted international agreements to the Senate for its advice and consent to ratification:

1. Message from the President of the United States Transmitting the Treaty on Conventional Armed Forces in Europe (CFE), with Protocols on Existing Types (with Annex), Aircraft Reclassification, Reduction, Helicopter Recategorization, Information Exchange (with Annex), Inspection, the Joint Consultative Group, and Provisional Application, Nov. 19, 1990, available at 1990 U.S.T. Lexis 227, see also 2441 UNTS 285.
2. Message from the President of the United States Transmitting the Document Agreed Among the States Parties to the Treaty on Conventional Armed Forces in Europe (CFE) of November 19, 1990, May 31, 1996 ("the Flank Document"), available at *http://www.gpo.gov/fdsys/pkg/CDOC-105tdoc5/pdf/CDOC-105tdoc5.pdf*.

II. INITIATING PROVISIONAL APPLICATION

A. Selected Statements Regarding Initiating Provisional Application

1. U.S.-Ukraine Mutual Legal Assistance Treaty

In an Exchange of Notes regarding Provisional Application of the US-Ukraine Mutual Legal Assistance Treaty, available at 1998 U.S.T. LEXIS 203, the United States and Ukraine agreed "that until such time as the Treaty enters into force through an exchange of instruments of ratification as provided for under Article 20(2) of the Treaty, [the United States and Ukraine] apply the terms of the Treaty to the extent possible under the respective domestic laws of the United States . . . and Ukraine." *Id.*

In hearings regarding the U.S.-Ukraine MLAT, a member of the Senate Foreign Relations Committee asked about provisional application in the following exchange:

Question. The United States and Ukraine exchanged diplomatic notes in September 1999 in which the two nations agreed to provisionally apply this MLAT.

- What was the reason or reasons for the United States proposing this provisional application?
- Did you consult with the Committee on Foreign Relations prior to doing so?
- What is the purported authority for the Executive to undertake such an agreement?

Answer. The United States exchanged notes with Ukraine on September 30, 1999 to apply the treaty provisionally, to the extent possible under the respective domestic laws of the United States and Ukraine. This was done at the request of the U.S. law enforcement community because of the urgent need to establish interim formal law enforcement relations to help with pending investigations, including investigations relating to corruption and fraud. After the notes were exchanged, the Justice Department sought and received evidence from Ukraine under this interim arrangement to advance its money laundering investigation of former Ukrainian Prime Minister Pavlo Lazarenko, leading to Lazarenko's indictment in the U.S. District Court for the Northern District of California on May 18, 2000.

In the wake of the dissolution of the Soviet Union and related developments, the Executive Branch advised the Committee in 1994 of the need to have effective mutual assistance relations and our consequent intention to utilize executive agreements and provisional application in some cases because of urgent law enforcement needs. This decision followed a series of meetings held by FBI Director Freeh in 1994 with law enforcement officials in Eastern Europe and the former Soviet Union. The United States and Latvia brought the U.S.-Latvia MLAT into force provisionally through an exchange of notes on June 13, 1997, and the treaty was approved by the Senate on October 21, 1998.

The provisional application of the Ukraine MLAT is an interim executive agreement that will terminate by its own terms when the MLAT enters into force. As noted above, the agreement by its express terms is limited to that which can be done under existing legal authority. Often assistance can be provided through administrative cooperation, which the Department of Justice and FBI routinely undertake even in the absence of an international agreement. To the extent that measures of compulsion are required, however, the primary relevant legal authority is Title 28, United States Code, Section 1782, which authorizes U.S. authorities to obtain assistance for proceedings in foreign tribunals, including criminal investigations conducted before formal accusation. The agreement's forfeiture-related provisions could be implemented as necessary under the forfeiture provisions of Title 18, 19 and 21. To the extent that authority does not exist to implement a particular request from Ukraine, assistance would need to be denied on a case-by-case basis.

Consideration of Pending Treaties: Hearings Before the S. Comm. on Foreign Relations, 106th Cong. (2000) (responses submitted by Samuel Witten, Assistant Legal Adviser for Law Enforcement and Intelligence, Department of State, and Bruce C. Swartz, Deputy Assistant Attorney General, Criminal Division, Department of Justice, to additional questions submitted by Senator Joseph R. Biden, Jr.), available at *http://www.gpo.gov/fdsys/pkg/CHRG-106shrg66882/pdf/CHRG-106shrg66882.pdf*.

2. Maritime Boundary Treaties

In hearings regarding potential ratification of three maritime boundary treaties, a member of the Senate Foreign Relations Committee asked about provisional application in the following exchange:

> ***Question***: What are the precedents for 'provisional application' of treaties and what criteria do you use in deciding when that approach is appropriate? Is it necessary to have an explicit provision in a treaty regarding its provisional application or can the parties simply agree outside of the treaty to do so?
>
> ***Answer***: A provisional maritime boundary might be established by an executive agreement separate from a treaty—as is the case in the current situation with Mexico. A provisional maritime boundary might be established by a provision on 'provisional application' in a treaty – such a provision itself constitutes a binding international agreement and can only be included in a treaty signed by the United States if the obligations undertaken in accordance with 'provisional application' are obligations within the President's competence under U.S. law. It is also possible for the President to determine, as a matter of policy and without reaching agreement with other Parties, that the United States will 'provisionally apply' a treaty signed by the United States so long as the obligations undertaken are all within the competence of the President under U.S. law. The primary factor for determining the appropriateness of provisional application relates to the immediate need to settle quickly matters in the interest of the United States which are within the President's domestic law competence.

Three Treaties Establishing Maritime Boundaries Between the United States and Mexico, Venezuela and Cuba: Hearing Before the S. Comm. on Foreign Relations, 99th Cong. (1980) (responses of Mark B. Feldman, Deputy Legal Adviser, Department of State to questions submitted by Sen. Jacob K. Javits), and see 74 Am. J. of Int'l Law 917 (1980), quoting *Digest of United States Practice in International Law* (1980), Ch. 5, Sec. 1, Provisional Application.

B. Selected Instruments Establishing Provisional Application

The following list of examples of operative language illustrates a range of provisions establishing provisional application that appear in agreements that the United States has signed or been a party to. This list does not purport to address all of the options for establishing provisional application, but only to identify some that have been used in the past:

1. Provisional application generally

a. The *US-Ethiopia Air Transport Agreement*, May 17, 2005, TIAS 06-721.1, available at *http://www.state.gov/documents/organization/185585.pdf*) provided that "[t]his Agreement and its Annexes shall apply provisionally upon signature and shall enter into force on the date on which both parties have informed each other through an exchange of diplomatic notes that their necessary internal procedures for entry into force of the Agreement have been completed." (Art. 17.)

b. The *Protocol Additional to the US-IAEA Agreement for the Application of Safeguards in the United States of America*, June 12, 1998, 1988 U.S.T. Lexis 214, available at *http://www.gpo.gov/fdsys/pkg/CDOC-107tdoc7/pdf/CDOC-107tdoc7.pdf*, provided that "[t]he United States may, at any date before this Protocol enters into force, declare that it will apply this Protocol provisionally." (Art. 17 (b) and (c).)

c. The *US-Guatemala Air Transport Agreement*, May 8, 1997, TIAS 01-97, (available at *http://www.state.gov/documents/organization/114296.pdf*), provided that "[t]he competent aeronautical authorities of the United States of America and the Republic of

Guatemala shall permit operations on a provisional basis to the designated airlines of each Party in accordance with the terms of the Agreement upon signature." (Art. 17.)

d. The *Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks*, Aug. 4, 1995, 2167 UNTS 3, provided that "[t]his Agreement shall be applied provisionally by a State or entity which consents to its provisional application by so notifying the depositary in writing. Such provisional application shall become effective from the date of receipt of the notification." (Art. 41 (1).)

e. The *Convention on Early Notification of a Nuclear Accident*, Sept. 26, 1986, 1439 UNTS 275, provided that "[a] State may, upon signature or at any later date before this Convention enters into force for it, declare that it will apply this Convention provisionally." (Art. 13.)

f. The *International Dairy Arrangement of the General Agreement on Tariffs and Trade*, Apr. 12, 1979, 1186 UNTS 54, provided that "[a]ny government may deposit with the Director-General to the Contracting Parties to the GATT a declaration of provisional application of this Arrangement. Any government depositing such a declaration shall provisionally apply this Arrangement and be provisionally regarded as participating in this Arrangement." (Art. VIII (2).)

2. Provisional application subject to domestic law

a. *The Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea*, July 28, 1994, 1836 UNTS 3, provided that:

> 1. If on 16 November 1994 this Agreement has not entered into force, it shall be applied provisionally pending its entry into force by: (a) States which have consented to its adoption in the General Assembly of the United Nations, except any such State which before 16 November 1994 notifies the depositary in writing either that it will not so apply this Agreement or that it will consent to such application only upon subsequent signature or notification in writing; (b) States and entities which sign this Agreement, except any such State or entity which notifies the depositary in writing at the time of signature that it will not so apply this Agreement; (c) States and entities which consent to its provisional application by so notifying the depositary in writing; (d) States which accede to this Agreement.
>
> 2. All such States and entities shall apply this Agreement provisionally in accordance with their national or internal laws and regulations, with effect from 16 November 1994 or the date of signature, notification of consent or accession, if later.

(Art. 7(1)-(2).)

b. The *US-Denmark Agreement On Enhancing Cooperation in Preventing and Combating Serious Crime*, Oct. 14, 2010, TIAS 11-505 (available at http://www.state.gov/documents/organization/169476.pdf), provided that "[t]he Parties shall provisionally apply this Agreement, with the exception of Articles 7 through 9, from the date of signature to the extent consistent with their domestic law." (Art. 23 (1).)

c. The *US-Czech Republic Agreement On Enhancing Cooperation in Preventing and Combating Serious Crime*, Nov. 12, 2008, TIAS 10-0091 (available at http://www.state.gov/documents/organization/143684.pdf), provided that "[t]he Parties shall provisionally apply this Agreement from the date of signature to the extent consistent with their domestic law." (Art. 26.)

d. *Arrangement on Provisional Application of the Agreement on the Establishment of the ITER International Fusion Energy Organization for the Joint Implementation of the ITER Project*, Nov. 21, 2006, TIAS 07-016 (available at http://www.state.gov/documents/organization/88464.pdf), provided that "[t]he Parties to this Arrangement therefore undertake, to the fullest extent possible consistent with their domestic laws and regulations, to abide by the terms of the ITER Agreement until it enters into force." (Art. 4.)

e. The *Agreement on an International Energy Program*, Nov. 18, 1974, 1040 UNTS 271, provided that "this Agreement shall be applied provisionally by all Signatory States, to the extent possible not inconsistent with their legislation, as from 18th November 1974 following the first meeting of the Governing Board." (Art. 68.)

f. The *Protocol for Provisional Application of the General Agreement on Tariffs and Trade*, Oct. 30, 1947, 55 UNTS 308, provided that a number of named governments "undertake, provided that this Protocol shall have been signed on behalf of all [such] Governments not later than November 15, 1947, to apply provisionally on and after January 1, 1948: (a) Parts I and III of the General Agreement on Tariffs and Trade, and (b) Part II of that Agreement to the fullest extent not inconsistent with existing legislation." (Art. 1.)

3. Provisional application of part of an agreement

a. The *US-Russia Treaty on Measures for the Further Reduction and Limitation of Strategic Offensive Arms, with Protocol*, Apr. 8, 2010, TIAS 11-205 (available at http://www.state.gov/documents/organization/202693.pdf), provided that "[u]ntil entry into force of the Treaty, the provisions of the Treaty and this Protocol, listed in this Part [not included here], shall apply provisionally from the date of signature of the Treaty." (Protocol Part VIII, Sect. 1.)

b. The *International Telecommunication Convention, with Annexes, and Final Protocol to the Convention*, Nov. 6, 1982, 1531 UNTS 2, 1982 U.S.T. LEXIS 222, provided in Additional Protocol VII on temporary arrangements that "[t]he Plenipotentiary Conference of the International Telecommunication Union (Nairobi, 1982) has agreed to the provisional application of the following arrangements until the entry into force of the International Telecommunication Convention (Nairobi, 1982): (1.) The Administrative Council, which shall be composed of forty-one Members, elected by the Conference in the manner prescribed in that Convention, may meet immediately after its election and perform the duties assigned to it under the Convention. (2.) The Chairman and Vice-Chairman to be elected by the Administrative Council during its first session shall remain in office until the election of their successors at the opening of the annual Administrative Council session of 1984."

4. Provisional application with eligibility requirements

a. The *Food Assistance Convention*, Apr. 25, 2012, TIAS 13-101 (available at https://treaties.un.org/doc/source/signature/2012/CTC_XIX-48.pdf), provided that "[a]ny State referred to in Article 12, or the European Union, that intends to ratify, accept, or approve this Convention or accede thereto, or any State or Separate Customs Territory deemed eligible under Article 13(2) for accession by a decision of the Committee but has not yet deposited its instrument, may at any time deposit a notification of provisional application of this Convention with the Depositary. The Convention shall apply provisionally for that State, Separate Customs Territory, or the European Union from the date of deposit of its notification." (Art. 14.)

b. The *Food Aid Convention*, Apr. 13, 1999, 2073 UNTS 135, provided that "[a]ny signatory Government may deposit with the depositary a declaration of provisional application of

this Convention. Any such Government shall provisionally apply this Convention in accordance with its laws and regulations and be provisionally regarded as a party thereto," (Art. XXII(c)), and "[a]ny Government acceding to this Convention under paragraph (a) of [Article XXIII], or whose accession has been agreed by the Committee under paragraph (b) of [Article XXIII], may deposit with the depositary a declaration of provisional application of this Convention pending the deposit of its instrument of accession. Any such Government shall provisionally apply this Convention in accordance with its laws and regulations and be provisionally regarded as a party thereto." (Art. XXIII.)

b. *The International Natural Rubber Agreement*, 1994, Feb. 17, 1995, 1964 UNTS 3, provided that "[a] signatory Government which intends to ratify, accept or approve this Agreement, or a Government for which the Council has established conditions for accession but which has not yet been able to deposit its instrument, may at any time notify the depositary that it will fully apply this Agreement provisionally, either when it enters into force in accordance with article 61 or, if it is already in force, at a specified date … [and] Notwithstanding the provisions of paragraph 1 of this article, a Government may provide in its notification of provisional application that it will apply this Agreement only within the limitations of its constitutional and/or legislative procedures and its domestic laws and regulations. However, such Government shall meet all its financial obligations to this Agreement. The provisional membership of a Government which notifies in this manner shall not exceed 12 months from the provisional entry into force of this Agreement, unless the Council decides otherwise pursuant to paragraph 2 of article 59." (Art. 60.)

c. The *International Sugar Agreement*, Oct. 7, 1977, 1064 UNTS 219, provided that "[a] signatory Government which intends to ratify, accept or approve this Agreement, or a Government for which the Council has established conditions for accession but which has not yet been able to deposit its instrument, may, at any time, notify the Secretary-General of the United Nations that it will apply this Agreement provisionally either when it enters into force in accordance with article 75 or, if it is already in force, at a specified date." (Art. 74 (1).)

5. Provisional application with exceptions

a. The *US-Cape Verde Millennium Challenge Compact*, Feb. 10, 2012, TIAS 12-1130.1 (available at *http://www.state.gov/documents/organization/203908.pdf*), provided that "[u]pon signature of this Compact, and until this Compact has entered into force in accordance with Section 7.3, the Parties shall provisionally apply the terms of this Compact; provided that, no MCC Funding, other than Compact Implementation Funding, shall be made available or disbursed before this Compact enters into force." (Section 7.5.)

6. Provisional application with time limits

a. The *Document Agreed Among the States Parties to the Treaty on Conventional Armed Forces in Europe* of November 19, 1990, May 31, 1996, U.S. Senate Treaty Doc. 105-5, Apr. 7, 1997 (available at *http://www.gpo.gov/fdsys/pkg/CDOC-105tdoc5/pdf/CDOC-105tdoc5.pdf*), provided that "Section II, paragraphs 2 and 3, Section IV and Section V of this Document are hereby provisionally applied as of 31 May 1996 through 15 December 1996. If this Document does not enter into force by 15 December 1996, then it shall be reviewed by the States Parties." (Section VI (1).)

An annex to the Document extended the provisional application as follows:

> "The Representatives of the States Parties to the Treaty on Conventional Armed Forces in Europe, at their session of the Joint Consultative Group on 1 December 1996, have adopted the following: (1) The provisional application of Section II, paragraphs 2 and 3,

Section IV and Section V of the "Document agreed among the States Parties to the Treaty on Conventional Armed Forces in Europe of November 19, 1990" at the First Conference to Review the Operation of the Treaty on Conventional Armed Forces in Europe and the Concluding Act of the Negotiation on Personnel Strength (hereinafter referred to as the Document), as set out in Section VI of the Document, is hereby extended until 15 May 1997. The Document shall enter into force upon receipt by the Depositary of notification of confirmation of approval by all States Parties. If the Document does not enter into force by 15 May 1997, then it shall be reviewed by the States Parties." (First paragraph.)

7. Provisional application by certain states

a. The *United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, with Annexes*, June 17, 1994, 1994 U.S.T. Lexis 212, provided that "[p]ending entry into force of this Convention, the African country Parties, in cooperation with other members of the international community, as appropriate, shall, to the extent possible, provisionally apply those provisions of the Convention relating to the preparation of national, subregional and regional action programmes." (Art. 7.)

8. Other provisional application provisions

a. The *Convention on the Organization for Economic Co-Operation and Development*, Dec. 14, 1960, 888 UNTS 179, allows members to apply decisions of the OECD provisionally, as follows: "No decision shall be binding on any Member until it has complied with the requirements of its own constitutional procedures. The other Members may agree that such a decision shall apply provisionally to them." (Art. 6.)

III. TERMINATING PROVISIONAL APPLICATION

A. Selected Instruments Terminating Provisional Application

1. Termination upon entry into force of the agreement:

a. The *Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, July 28, 1994*, 1836 UNTS 3, provided that "[p]rovisional application shall terminate upon the date of entry into force of this Agreement. In any event, provisional application shall terminate on 16 November 1998 if at that date the requirement in article 6, paragraph 1, of consent to be bound by this Agreement by at least seven of the States (of which at least five must be developed States) referred to in paragraph 1(a) of resolution II has not been fulfilled." (Art. 7(3).)

b. The *Agreement relating to the International Telecommunications Satellite Organization*, Aug. 20, 1971, 1220 UNTS 22, provided that "[p]rovisional application shall terminate [for several reasons, including]: (i) Upon deposit of an instrument of ratification, acceptance or approval of this Agreement by that Government …" (Art. XX.)

c. The *Agreement on an International Energy Program*, Nov. 18, 1974, 1040 UNTS 272, provided that "[p]rovisional application of the Agreement shall continue until [any of three events, including]: the Agreement enters into force for the State concerned in accordance with Article 67, …." (Art. 68.)

2. Termination for any reason:

a. The *US-Germany Agreement to Facilitate Interchange of Patent Rights and Technical Information for Defense Purposes*, Jan. 4, 1956, 268 UNTS 143, provided that "provisional application may be terminated by one month's notice by either Contracting Government." (Art. IX.)

b. The *US-Marshall Islands Agreement concerning Cooperation to Suppress the Proliferation of Weapons of Mass Destruction, their Delivery Systems, and Related Materials by Sea*, Aug. 13, 2004, TIAS 04-1124, provided that "[e]ither Party may discontinue provisional application at any time … [and] [e]ach Party shall notify the other Party immediately of any constraints or limitations on provisional application, of any changes to such constraints or limitations, and upon discontinuation of provisional application." (Art. 17(2).)

3. Termination upon determination not to ratify the agreement:

a. The *Agreement relating to the International Telecommunications Satellite Organization "Intelsat"*, Aug. 20, 1971, 1220 UNTS 22, provided that "[p]rovisional application shall terminate [for several reasons, including]: … (iii) Upon notification by that Government, before expiration of the period mentioned in subparagraph (ii) of this paragraph, of its decision not to ratify, accept or approve this Agreement." (Art. XX.)

b. The *Agreement on an International Energy Program*, Nov. 18, 1974, 1040 UNTS 272, provided that "[p]rovisional application of the Agreement shall continue until [any of three events, including]: … 60 days after the Government of the Kingdom of Belgium receives notification that the State concerned will not consent to be bound by the Agreement, …." (Art. 68.)

4. Termination after specific time period:

a. The *Agreement relating to the International Telecommunications Satellite Organization "Intelsat"*, Aug. 20, 1971, 1220 UNTS 22, provided that "[p]rovisional application shall terminate [for several reasons, including]: … (ii) Upon expiration of two years from the date on which this Agreement enters into force without having been ratified, accepted or approved by that Government; …" (Art. XX.)

b. The *Agreement on an International Energy Program*, Nov. 18, 1974, 1040 UNTS 272, provided that "[p]rovisional application of the Agreement shall continue until [any of three events, including]: … the time limit for notification of consent by the State concerned referred to in Article 67 expires." (Art. 68.)

c. The *US-Cuba Maritime Boundary Agreement*, Dec. 16, 1977, TIAS 12-208.1, has been the subject of a series of diplomatic note exchanges provisionally applying the agreement for successive two-year periods pursuant to language such as the following, from a 2011-12 exchange of notes: "The Ministry, representing the Government of the Republic of Cuba, has the honor to propose that the terms of the Maritime Boundary Agreement of December 16, 1977 continue to be applied on a provisional basis beginning January 1, 2012, for a period of two years, pending its permanent entry into force on the date of the exchange of instruments of ratification."

5. Termination of prior provisionally applied agreement:

a. The *US-Guatemala Air Transport Agreement*, May 8, 1997, TIAS 01-97 (available at http://www.state.gov/documents/organization/114296.pdf), provided that "[p]rovisional application of the Air Transport Agreement between the Government of the United States of America and the Government of the Republic of Guatemala, signed at Guatemala, July 16, 1992, shall terminate upon signature of this Agreement." (Art. 17.)

6. Termination pursuant to general withdrawal provision applicable to the underlying agreement:

a. The *Agreement Establishing Interim Arrangements for a Global Commercial Communications Satellite System*, Aug. 20, 1964, 514 UNTS 26, provided that: "Any Government which signs this Agreement subject to a reservation as to approval may, so long as

this Agreement is open for signature, declare that it applies this Agreement provisionally and shall thereupon be considered a Party to this Agreement. Such provisional application shall terminate: (i) upon approval of this Agreement by that Government, or (ii) upon withdrawal by that Government in accordance with Article XI of this Agreement." (Art. XII.)

IV. LEGAL EFFECT OF PROVISIONAL APPLICATION

A. Selected U.S. Practice

1. Provisional Application of Maritime Boundary Treaties

In hearings regarding potential ratification of three maritime boundary treaties, a member of the Senate Foreign Relations Committee asked about provisional application in the following exchange:

> ***Question***: What is the domestic legal status of a treaty applied provisionally? How is provisional application related to the obligation of treaty partners not to take any action prior to final ratification to defeat the 'object and purpose' of the agreement?
> ***Answer***: A treaty applied provisionally has the same legal status as any agreement of the United States concluded by the President on his own authority. The American Law Institute, in a draft commentary on provisional application of treaties for the United States, stated: 'If consent of the Senate or Congress is required for the conclusion of an agreement but has not yet been obtained, agreement by the United States for provisional effect must normally rest on the President's authority.' (Tentative Draft No. 1, Foreign Relations Law of the United States (Revised), p. 117.)
>
> A provisional application of a treaty, even though it might commit the nation to a particular course, does so temporarily and does not represent the final commitment of the nation. As such, it is closely tied to the negotiation process. While the President may not, through provisional application of treaties, change existing law, treaties applied provisionally within the President's authority have full effect under domestic law pending a decision with respect to ratification.
>
> The provisional application is terminated if the United States or its treaty partner informs the other of its intention not to become a party to the agreement. The treaty enters into force definitively if the Senate approves and the President formally ratifies the treaty. If the United States enters into a commitment with its treaty partner to apply a treaty provisionally pending ratification, the legal effect is the same as an executive agreement to apply the treaty provisionally. If there is no commitment to another state, but simply a unilateral policy decision by the President to apply the treaty provisionally, the President's power must be derived entirely from his domestic law authority. A unilateral provisional application would present a question of domestic Constitutional law separate from the President's treaty or agreement power.
>
> There is no direct relationship between provisional application and the obligation of treaty partners not to take actions prior to ratification that would defeat the object and purpose of the treaty. Provisional application means that treaty terms are applied temporarily pending final ratification. The obligation not to defeat the object and purpose of the treaty prior to ratification could, in theory, necessitate pre-ratification application of provisions, if any, where non-application from the date of signature would defeat the object and purpose of the treaty. Such provisions are rare. In the majority of cases the obligation not to defeat the object and purposes of the treaty means a duty to refrain from taking steps that would render impossible future application of the treaty when ratified.

Three Treaties Establishing Maritime Boundaries Between the United States and Mexico, Venezuela and Cuba: Hearing Before the S. Comm. on Foreign Relations, 99th Cong. (1980) (responses of Mark B. Feldman, Deputy Legal Adviser, Department of State to questions submitted by Sen. Jacob K. Javits), see 74 Am. J. of Int'l Law 917 (1980), quoting *Digest of United States Practice in International Law* (1980), Ch. 5, Sec. 1, Provisional Application

2. Provisional Application of the Food Aid Convention, 1974

As described in the *Digest of United States Practice in International Law*, 1974, at 234-37, the International Wheat Council sought the United States' position regarding, *inter alia*, the legal significance of provisional application of the Food Aid Convention. Key excerpts from the response are set forth below (emphasis added):

> *It is very difficult, if not impossible, to perceive any valid basis for considering the effect of the deposit of a declaration of provisional application as being limited to "moral implications."* There does not appear to be any basis for such an interpretation either in the provisions of the Convention itself or in generally recognized treaty law and practice.
>
> … The expression "provisional application" is the subject to Article 25 of the Vienna Convention on the Law of Treaties which, although not yet in force, is the most recent consensus of the world community on the law of treaties. That Article is as follows: [quotes Article 25] *It will be observed that the above-quoted Article 25 makes no distinction between the effect of a treaty being provisionally applied and a treaty deemed to be fully in force other than to recognize the right, unless the treaty otherwise provides, of a state to notify the other states between which the treaty is being applied provisionally of its intention not to become a party to the treaty.*
>
> … In Article 2, paragraph 1(g) of the Vienna Convention on the Law of Treaties the word "party" is defined as meaning "a state which has consented to be bound by the treaty and for which the treaty is in force." *It appears that under the provisions of the Food Aid Convention, 1971 [governments and international organizations that] deposited declarations of provisional application are on the same level as to rights and obligations as Governments which deposit instruments of ratification or accession … [noting minor exceptions]*.

3. U.S. Court Application of the Protocol of Provisional Application of the General Agreement on Tariffs and Trade

The following decisions from U.S. courts address the *Protocol of Provisional Application of the General Agreement on Tariffs and Trade*, Apr. 21, 1951, 3 U.S.T. 588. They offer examples of legal effect being given to provisionally-applied agreements or provisions of agreements.

a. *Michelin Tire Corp. v. United States*, 2 C.I.T. 143, 146-147 (Ct. Int'l Trade 1981), *vacated on other grounds* 9 C.I.T. 38, 39 (Ct. Int'l Trade 1985)

> The Court also finds that the determination did not violate the terms of GATT. Concededly, Article VI [of the GATT] requires an injury determination which was not made in this case. However, the Protocol of Provisional Application provides that the United States, among others, undertook to apply Article VI "to the fullest extent not inconsistent with existing legislation." This provision allowed the continued effectiveness of inconsistent legislation if it was mandatory in nature. The countervailing duty law under which this determination was made was mandatory and therefore even though it did not require an injury determination it remained effective. Although plaintiff seeks to characterize the Secretary's application of the law as discretionary, this was not proven to

be the case. The investigation, whatever its flaws, did find the existence of bounties and grants and, under the law, the Secretary had no discretion to do other than order the assessment of countervailing duties.

b. *Footwear Distribs. & Retailers of Am. v. United States*, 18 C.I.T. 391, 394, 399, 407-07 (Ct. Int'l Trade 1994)

On 12 September 1974 the U.S. Department of the Treasury issued a countervailing duty order (T.D. 74-233, 39 FR 32903) regarding non-rubber footwear from Brazil. Pursuant to this order countervailing duties were imposed, as of that date, under Section 303 of the Tariff Act of 1930 which had been covered by the existing legislation clause under the GATT Protocol of Provisional Application, and therefore no injury determination was made. In accordance with the U.S. law and practice then in effect, suspension of liquidation was not ordered and duties in the amounts determined in the countervailing duty order were collected upon entry.

… When the United States acceded to GATT in 1947, this section [of U.S. law] was not in harmony with article VI:6(a) of the General Agreement, which requires that the effect of a subsidy be to cause, or threaten to cause, material injury to an established domestic industry, or to retard materially the establishment of one. Hence, section 303 was "grandfathered" by the GATT Protocol of Provisional Application requiring that the parties thereto undertake to apply article VI "to the fullest extent not inconsistent with existing legislation."

* * * *

B. LITIGATION INVOLVING TREATY LAW ISSUES

As discussed in *Digest 2013* at 91-98, the United States filed its brief in the U.S. Supreme Court in 2013 in *Bond v. United States*, No. 12-158. The petitioner, Carol Anne Bond, was convicted of using a chemical weapon, in violation of 18 U.S.C. § 229(a)(1). Closely tracking the language of the Chemical Weapons Convention, Section 229 criminalizes "knowingly" "possess[ing]" or "us[ing]" a "chemical weapon." Petitioner had used two toxic chemicals to attempt to harm another woman who had become pregnant as a result of an affair with petitioner's husband. For further background on the case and excerpts from U.S. briefs filed previously on appeal, see *Digest 2012* at 97-100 and *Digest 2011* at 111-17.

The Supreme Court issued its decision in the case on June 2, 2014. 134 S.Ct. 2077 (2014). The majority opinion of the Court avoids the question of the scope of the Treaty Power under the Constitution, instead employing statutory analysis to find that Section 229 was not intended to address actions like petitioner's, that are more properly a subject of the police power of the states.

_____

* * * *

The question presented by this case is whether the Implementation Act also reaches a purely local crime: an amateur attempt by a jilted wife to injure her husband's lover, which ended up causing only a minor thumb burn readily treated by rinsing with water. Because our constitutional structure leaves local criminal activity primarily to the States, we have generally declined to read federal law as intruding on that responsibility, unless Congress has clearly indicated that the law should have such reach. The Chemical Weapons Convention Implementation Act contains no such clear indication, and we accordingly conclude that it does not cover the unremarkable local offense at issue here.

* * * *

In our federal system, the National Government possesses only limited powers; the States and the people retain the remainder. The States have broad authority to enact legislation for the public good—what we have often called a "police power." *United States v. Lopez*, 514 U.S. 549, 567, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995). The Federal Government, by contrast, has no such authority and "can exercise only the powers granted to it," *McCulloch v. Maryland*, 4 Wheat. 316, 405, 4 L.Ed. 579 (1819), including the power to make "all Laws which shall be necessary and proper for carrying into Execution" the enumerated powers, U.S. Const., Art. I, § 8, cl. 18.
…

* * * *

The Government replies that this Court has never held that a statute implementing a valid treaty exceeds Congress's enumerated powers. To do so here, the Government says, would contravene another deliberate choice of the Framers: to avoid placing subject matter limitations on the National Government's power to make treaties. And it might also undermine confidence in the United States as an international treaty partner.

Notwithstanding this debate, it is "a well-established principle governing the prudent exercise of this Court's jurisdiction that normally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case." *Escambia County v. McMillan*, 466 U.S. 48, 51, 104 S.Ct. 1577, 80 L.Ed.2d 36 (1984) (*per curiam*); see also *Ashwander v. TVA*, 297 U.S. 288, 347, 56 S.Ct. 466, 80 L.Ed. 688 (1936) (Brandeis, J., concurring). Bond argues that section 229 does not cover her conduct. So we consider that argument first.

* * * *

Fortunately, we have no need to interpret the scope of the Convention in this case. Bond was prosecuted under section 229, and the statute—unlike the Convention—must be read consistent with principles of federalism inherent in our constitutional structure.

* * * *

We do not find any such clear indication [that Congress meant to reach purely local crimes] in section 229. "Chemical weapon" is the key term that defines the statute's reach, and it is defined extremely broadly. But that general definition does not constitute a clear statement that Congress meant the statute to reach local criminal conduct.

In fact, a fair reading of section 229 suggests that it does not have as expansive a scope as might at first appear. To begin, as a matter of natural meaning, an educated user of English would not describe Bond's crime as involving a "chemical weapon." Saying that a person "used a chemical weapon" conveys a very different idea than saying the person "used a chemical in a way that caused some harm." The natural meaning of "chemical weapon" takes account of both the particular chemicals that the defendant used and the circumstances in which she used them.

When used in the manner here, the chemicals in this case are not of the sort that an ordinary person would associate with instruments of chemical warfare. The substances that Bond used bear little resemblance to the deadly toxins that are "of particular danger to the objectives of the Convention." Why We Need a Chemical Weapons Convention and an OPCW, in Kenyon & Feakes 17 …. More to the point, the use of something as a "weapon" typically connotes "[a]n instrument of offensive or defensive combat," Webster's Third New International Dictionary 2589 (2002), or "[a]n instrument of attack or defense in combat, as a gun, missile, or sword," American Heritage Dictionary 2022 (3d ed. 1992). But no speaker in natural parlance would describe Bond's feud-driven act of spreading irritating chemicals on Haynes's door knob and mailbox as "combat." …

In settling on a fair reading of a statute, it is not unusual to consider the ordinary meaning of a defined term, particularly when there is dissonance between that ordinary meaning and the reach of the definition. …

* * * *

In light of all of this, it is fully appropriate to apply the background assumption that Congress normally preserves "the constitutional balance between the National Government and the States." *Bond I*, 564 U.S., at ——, 131 S.Ct., at 2364. That assumption is grounded in the very structure of the Constitution. And as we explained when this case was first before us, maintaining that constitutional balance is not merely an end unto itself. Rather, "[b]y denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power." *Ibid*.

* * * *

It is also clear that the laws of the Commonwealth of Pennsylvania (and every other State) are sufficient to prosecute Bond. Pennsylvania has several statutes that would likely cover her assault. See 18 Pa. Cons.Stat. §§ 2701 (2012) (simple assault), 2705 (reckless endangerment), 2709 (harassment). And state authorities regularly enforce these laws in poisoning cases. …

* * * *

As we have explained, "Congress has traditionally been reluctant to define as a federal crime conduct readily denounced as criminal by the States." *Bass*, 404 U.S., at 349, 92 S.Ct. 515. There is no clear indication of a contrary approach here. Section 229 implements the Convention, but Bond's crime could hardly be more unlike the uses of mustard gas on the Western Front or nerve agents in the Iran–Iraq war that form the core concerns of that treaty. See Kenyon & Feakes 6. …

* * * *

In sum, the global need to prevent chemical warfare does not require the Federal Government … to treat a local assault with a chemical irritant as the deployment of a chemical weapon. There is no reason to suppose that Congress—in implementing the Convention on Chemical Weapons—thought otherwise.

The Convention provides for implementation by each ratifying nation "in accordance with its constitutional processes." Art. VII(1), 1974 U.N.T.S. 331. As James Madison explained, the constitutional process in our "compound republic" keeps power "divided between two distinct governments." The Federalist No. 51, p. 323 (C. Rossiter ed. 1961). If section 229 reached Bond's conduct, it would mark a dramatic departure from that constitutional structure and a serious reallocation of criminal law enforcement authority between the Federal Government and the States. Absent a clear statement of that purpose, we will not presume Congress to have authorized such a stark intrusion into traditional state authority.

* * * *

Cross References

Extradition treaty with Chile, **Chapter 3.A.1.**
ILC's work on subsequent agreements and subsequent practice in relation to interpretation of treaties, **Chapter 7.D.2.**
ILC's work on provisional application of treaties, **Chapter 7.D.3.**
Transmittal of tax treaties to U.S. Senate, **Chapter 11.E.1.**
United States-Micronesia maritime boundary treaty, **Chapter 12.A.1.**
Ratification of fisheries conventions and amendment, **Chapter 13.B.2.**
Cultural Property MOUs with China, Bulgaria, and Honduras, **Chapter 14.A.**
Litigation involving alleged NPT breach, **Chapter 19.B.2.C.**